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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/089,871	06/04/1998	RUDOLF CAROLUS MARIA BARENDE	97253-A	3289
25225	7590	02/22/2005	EXAMINER	
MORRISON & FOERSTER LLP 3811 VALLEY CENTRE DRIVE SUITE 500 SAN DIEGO, CA 92130-2332			RAMIREZ, DELIA M	
			ART UNIT	PAPER NUMBER
			1652	

DATE MAILED: 02/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/089,871	BARENDE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Delia M. Ramirez	1652	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 03 December 2004.  
 2a) This action is **FINAL**.      2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 18-28,31-35,39 and 40 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 18-28,31-35,39 and 40 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                     | Paper No(s)/Mail Date. _____ .  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|  | 6) <input type="checkbox"/> Other: _____ .                                  |

**DETAILED ACTION**

*Status of the Application*

Claims 18-28, 31-35, 39 and 40 are pending.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/3/2004 has been entered.

Rejections and/or objections not reiterated from previous office actions are hereby withdrawn.

*Claim Rejections - 35 USC § 103*

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. Claims 18-21, 24-28, and 31-35 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Nielsen et al. (WO 95/28850, November 2, 1995; cited in previous Office Actions) in view of Ghani (U.S. Patent No. 6120811, filed 10/4/1996).
3. Claims 22-23 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Nielsen et al. (WO 95/28850, November 2, 1995; cited in previous Office Actions) in view of Ghani (U.S. Patent No. 6120811, filed 10/4/1996) as applied to claims 18-21, 24-28, and 31-35 above, and further in view of Markussen et al. (U.S. Patent No. 4106991, 1978; cited in previous Office Actions).
4. Claims 39 and 40 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Nielsen et al. (WO 95/28850, November 2, 1995; cited in previous Office Actions) in view of Ghani (U.S. Patent No. 6120811, filed 10/4/1996) and Markussen et al. (U.S. Patent No. 4106991, 1978; cited in previous

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Office Actions) as applied to claims 22-23 above, and further in view of Haarasilta (GB 2-139868A, 1984).

5. These rejections have been discussed at length in Paper No. 30, mailed on 2/24/2003, Paper No. 33, mailed on 11/3/2003, and Advisory Action, mailed on 6/3/2004.

6. Applicants argue that Nielsen et al. does not teach whether the phytase ranges taught apply to a granulate, liquid or other form of animal feed additive, or whether a granulate is to have all of these concentrations values. According to Applicants, Nielsen et al. fails to teach a method to obtain a granulate having a phytase concentration of at least 6000 FTU/g because Nielsen does not teach how to obtain a liquid with sufficient phytase concentration to give this result. Applicants refer to the teachings of EP420358, which is incorporated by reference in Nielsen et al., in support of the argument that phytase concentration in a liquid as disclosed by Nielsen et al. could not be used to make a granulate having at least 6000 FTU/g. Applicants further refer to the working examples of Nielsen et al. and state that Nielsen et al. does not disclose whether the Phytase Novo<sup>TM</sup> product used is a granulate, liquid, or purified enzyme. Therefore, Nielsen et al. does not teach how to produce a granulate with the claimed phytase concentration or phytase-containing liquid as claimed. Applicants submit that neither Ghani, Markussen nor Haarasilta cure the deficiencies of Nielsen et al. Thus, none of the references cited alone or in combination teach or suggest the claimed invention.

7. Applicant's arguments have been fully considered but are not deemed persuasive to overcome the instant rejection. The Examiner acknowledges that it is unclear from the specification whether the Phytase Novo<sup>TM</sup> product used (6900 FYT/g; page 14) is a granulate or a liquid. However, it is reiterated herein that Nielsen et al. teach that the animal feed additive of the invention they disclosed is a granulated enzyme product (page 10, lines 16-21) and also disclose the phytase concentration of the animal feed additive as being at least 6000 FTU/g (page 11, lines 27-30). While it is agreed that Nielsen et al. does not teach a working example of a phytase granulate comprising at least 6000 FTU/g, at a minimum,

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Nielsen et al. clearly suggest a phytase granulate comprising at least 6000 FTU/g in view of the fact that Nielsen et al. discloses phytase concentration ranges which would be at least 6000 FTU/g and teaches that the animal feed additive can be a granulated enzyme product. In regard to arguments that the exemplary liquid phytase concentrations disclosed by Nielsen et al. would not result in a granulate having at least 6000 FTU/g, while the Examiner agrees that those particular phytase solutions would not result in a granulate having at least 6000 FTU/g, it is noted that once the required phytase concentration in the granulate is known, which is the case herein since Nielsen et al. discloses phytase concentration ranges encompassing what is being recited, one of skill in the art would clearly know that the starting liquid phytase solution must contain a higher phytase concentration than the desired granulate. It would certainly be within the knowledge of one of ordinary skill in the art to calculate the concentration range of phytase in the starting liquid solution to obtain a granulate with at least 6000 FTU/g. In the absence of any evidence suggesting that it would be unlikely to obtain a liquid phytase solution having a phytase concentration higher than 6000 FTU/g, there is a reasonable expectation of successfully making such liquid phytase solution since dilution and concentration of protein solutions is well known and widely used in the art. Neither Nielsen et al. nor Applicants have shown that preparing a liquid phytase solution having a phytase concentration which is higher than 6000 FTU/g would be unexpected. Therefore, the combined teachings of Nielsen et al., Ghani, Markussen and Haarasilta as previously discussed render the claimed invention obvious over the prior art.

### ***Conclusion***

8. No claim is in condition for allowance.
9. All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114.

Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Certain papers related to this application may be submitted to Art Unit 1652 by facsimile transmission. The FAX number is (703) 872-9306. The faxing of such papers must conform with the notices published in the Official Gazette, 1156 OG 61 (November 16, 1993) and 1157 OG 94 (December 28, 1993) (see 37 CFR 1.6(d)). NOTE: If Applicant submits a paper by FAX, the original copy should be retained by Applicant or Applicant's representative. NO DUPLICATE COPIES SHOULD BE SUBMITTED, so as to avoid the processing of duplicate papers in the Office.

11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PMR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Delia M. Ramirez whose telephone number is (571) 272-0938. The examiner can normally be reached on Monday-Friday from 8:30 AM to 5:00 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Dr. Ponnathapura Achutamurthy can be reached on (571) 272-0928. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-1600.

Delia M. Ramirez, Ph.D.  
Patent Examiner  
Art Unit 1652

DR  
February 9, 2005

*E. Slobodyansky*  
**ELIZABETH SLOBODYANSKY, PH.D  
PRIMARY EXAMINER**